



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No.

**76-1537**

IRVING MASON, on behalf of himself and all others similarly situated, and derivatively on behalf of C.I. REALTY INVESTORS,  
*Petitioner,*

vs.

CITY INVESTING COMPANY, C.I. REALTY INVESTORS, C.I. PLANNING CORPORATION, WILLIAM POLK CAREY, JOHN L. GIBBONS, PETER C.R. HUANG, JAMES V. TOMAI, JR., ROBERT M. MORGAN, WILLIAM S. RENCHARD, FRED R. SULLIVAN, JAMES R. WEBB and REYNOLDS SECURITIES INC.,  
*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

Opinions Below .....	1
Jurisdiction .....	2
Questions Presented .....	2
Statutes and Rules Involved .....	3
Statement of the Case .....	3

## REASONS FOR GRANTING THE WRIT:

1. The decision below is in direct conflict with the decision of this court in <i>J.I. Case v. Borak</i> , 377 U.S. 426 (1964) .....	7
2. There exists a conflict in the law of the Circuits regarding the important issue raised herein .....	7
3. State corporate law which conflicts with the overriding federal interest in the protection of the investing public cannot control litigation under the Exchange Act .....	13
4. This court should decide the question of whether the rationale underlying <i>Van Dusen v. Barrack</i> , 376 U.S. 612 (1964) determines the interpretation of <i>federal</i> law which the transferor district would apply .....	16
Conclusion .....	18

## CASES CITED:

<i>Affiliated Ute Citizens of Utah v. United States</i> , 406 U.S. 128 (1972) .....	14
<i>Berry Petroleum Co. v. Adams &amp; Peck</i> , 518 F.2d 402 (2d Cir. 1975) .....	17

## TABLE OF CONTENTS

## CASES CITED:

Brody v. Chemical Bank, 482 F.2d 111 (2d Cir.), cert. denied 414 U.S. 1104 (1973) .....	8
Champion Home Builders Co. v. Jeffress, 490 F.2d 611 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974) .....	13
Clement A. Evans & Co. v. McAlpine, 434 F.2d 100 (5th Cir. 1970), cert. denied 402 U.S. 988 (1971) .....	12
Columbia General Investing Corp. v. S.E.C., 265 F.2d 559 (5th Cir. 1959) .....	14
Crane v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), cert. denied 400 U.S. 822 (1970) .....	14
David Steinberg, et al. v. William Polk Carey, et al., 75 Civ. 1995 (IBW) .....	5
Dopp v. American Electronics, 55 F.R.D. 151 (S.D. N.Y. 1972) .....	8, 16
Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1971), aff'd in part, rev'd in part on other grounds, 453 F.2d 736 (1972) (en banc) .....	8, 12, 16
Fielding v. Allen, 181 F.2d 163 (2d Cir.), cert. denied sub nom., Ogden Corp. v. Fielding, 340 U.S. 817 (1950) .....	15, 16
Fields v. Fidelity Gen. Ins. Co., 454 F.2d 682 (7th Cir. 1971) .....	12
Gilson v. Chock Full O'Nuts Corp., 331 F.2d 107 (2d Cir. 1964) .....	13

## TABLE OF CONTENTS

## CASES CITED:

Globus Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D. N.Y. 1970) aff'd 442 F.2d 1346 (2d Cir.), cert. denied 404 U.S. 941 (1971) .....	13
Hall v. American Cone & Pretzel Co., 71 F. Supp. 266 (E.D. Pa. 1947) .....	13
Halprin v. Babbitt, 303 F.2d 138 (1st Cir. 1962) .....	9
Hawes v. City of Oakland, 104 U.S. 450 (1882) .....	15
H. L. Green Co. v. MacMahon, 312 F.2d 650 (2d Cir. 1962), cert. denied 372 U.S. 928 (1963) .....	17
In re Air Crash Disaster at Boston Mass, 399 F. Supp. 1106 (D. Mass. 1975) .....	17
In re Four Seasons Sec. Lit., 370 F. Supp. 219 (W.D. Okl. 1974) .....	17
In re Plumbing Fixtures Lit., 342 F. Supp. 756 (JPML 1972) .....	17
Jannes v. Microwave Communications, 57 F.R.D. 18 (N.D. Ill. 1972) .....	8, 11, 15, 16
J. I. Case v. Borak, 377 U.S. 426 (1964) .....	7, 10, 14
Jones v. The Equitable Life Assurance Society, 409 F. Supp. 370 (S.D. N.Y. 1975) .....	8
Levitt v. Johnson, 334 F.2d 815 (1st Cir. 1964), cert. denied 379 U.S. 961 (1965) .....	8, 9, 16

## TABLE OF CONTENTS

## CASES CITED:

McClure v. Borne Chemical, 292 F.2d 824 (3rd Cir.), cert. denied 368 U.S. 939 (1961) .....	11, 15, 16
Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied 390 U.S. 951 (1968) .....	12-13
Ogden Corp. v. Fielding, 340 U.S. 817 (1950) .....	15
Philadelphia Housing Auth v. American Radiator & Standard Sanitary Corp., 309 F. Supp. 1053 (E.D. Pa. 1969) .....	17
Phillips v. Bradford, 62 F.R.D. 681 (S.D. N.Y. 1974) .....	16
Pittsburgh & Lake Erie R.R. Co. Sec. & Antit. Lit., In re, 543 F.2d 1058 (3rd Cir. 1976) .....	8, 10, 16, 17
Rodgers v. American Can Co., 305 F.2d 297 (3rd Cir. 1962) .....	11
Scheinbart v. Certain-Teed Products Corp., 367 F. Supp. 707 (S.D. N.Y. 1973) .....	17
S.E.C. v. Capital Gains Research Bureau, 393 F.2d 214 (2d Cir. 1968) .....	13
S.E.C. v. Capital Gains Research Bureau, 375 U.S. 180 (1963) .....	14
Tcherepnin v. Knight, 389 U.S. 332 (1967) .....	7-8, 13, 14
Van Dusen v. Barrack, 376 U.S. 612 (1964) .....	3, 16

## TABLE OF CONTENTS

## CASES CITED:

Weiss v. Sunasco Inc., 316 F. Supp. 1197 (E.D. Pa. 1970) .....	11
Wolf v. Frank, 477 F.2d 467 (5th Cir. 1973), cert. denied 414 U.S. 975 (1973) .....	12

## AUTHORITIES CITED:

Bloomenthal, Securities & Federal Corporate Law, Sec. 11.20(2) (1974) .....	10
Bromberg, Fraud-SEC R. 10b-5, Sec. 11.7 (1975) ....	10
Carey, Cases on Corporation, 4th Ed. at 341 (1969) ..	10
Loss, Securities Regulation, Vol. II at 951 (1961) as supplemented, Vol. V at 2920 (1969) .....	10
Note, 50 Va. L. Rev. 365 (1964) .....	10
7A Wright & Miller, Federal Practice and Procedure: Civil Sec. 1832 (1972) .....	10, 15
78 Harv. L. Rev. 1476 (1965) .....	10
13 Fletcher Cy. Corp. Sec. 5970 at 385 (1970 Revised Ed.) .....	10

## FEDERAL STATUTES CITED:

28 U.S.C. §1254(1) .....	2
28 U.S.C. §§1404(a) & 1407 .....	4, 16
Securities Exchange Act of 1934, §§10(b) & 14(a) .....	2, 3, 4, 5, 11, 15
§16(b) .....	13



## TABLE OF CONTENTS

## FEDERAL RULES CITED:

Rule 23.1 .....	3, 8, 9, 15
Rule 54(b) .....	6

SECURITIES AND EXCHANGE COMMISSION  
RULES [17 CFR §240.0-1 et seq.] CITED:

Rule 10b-5 & 14a-9 .....	3, 4, 12
Rule 13a-13 .....	4

## APPENDIX

Appendix A—Opinion and Judgment of the Second Circuit .....	1a
Appendix B—Order and Final Judgment of the District Court .....	3a
Appendix C—Statutes and Rules Involved .....	5a
Appendix D—Order of the Second Circuit denying rehearing .....	8a

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Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit

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Petitioner, Irving Mason, respectfully prays that a writ  
of certiorari issue to review the decision and judgment of  
the Court of Appeals for the Second Circuit in the above  
action.

## OPINIONS BELOW

The opinion and judgment of the Second Circuit, not  
officially reported, is reproduced as Appendix A hereto.  
The judgment of the District Court is reproduced as Ap-  
pendix B.

## JURISDICTION

The opinion and judgment of the Second Circuit were filed on November 9, 1976. A timely petition for rehearing was denied by order of February 18, 1977 (Appendix D).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

## QUESTIONS PRESENTED

This petition arises from an order by Judge Wyatt of the United States District Court for the Southern District of New York, dismissing two counts of petitioner's complaint which alleged, *inter alia*, violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934, derivatively on behalf of C.I. Realty Investors. These derivative causes of action were dismissed for failure to make a demand on the shareholders of the trust as required by Massachusetts law.

The broad issue raised here is the proper relationship of state corporation law vis-a-vis the congressional policy underlying the federal securities laws. That issue is presented more specifically by the following questions:

Whether the Courts below erred in holding that a shareholder of a Massachusetts corporation or business trust must first make a demand on all of the corporation's shareholders before being permitted to assert derivative claims on behalf of the corporation where:

(1) The derivative claims are grounded on the Securities Exchange Act of 1934;

(2) Such a requirement would be unreasonably burdensome and would conflict with federal policy; and

(3) The law of the transferor forum, which must be applied pursuant to *Van Dusen v. Barrack*, 376 U.S. 612 (1964), does not require a demand on the shareholders of a publicly held corporation as a condition precedent to bringing a derivative suit.

## STATUTES AND RULES INVOLVED

The statutes and rules involved are:

Sections 10-b and 14-a of the Securities Exchange Act of 1934 and Rules 10b-5 and 14a-9 thereunder; and

Rule 23.1 Fed. R. Civ. P.

They are set forth in Appendix C.

## STATEMENT OF THE CASE

## Introduction

In an April 13, 1972, public offering, C.I. Realty Investors raised approximately \$65,000,000 by selling 2,600,000 Units of the Trust's securities to the public at \$25.00 per Unit. Each Unit contained one share of beneficial interest in the Trust and one warrant to purchase an additional share at \$25.00. On April 13, 1972, petitioner Irving Mason purchased 1,000 units of the Trust for \$25,000. The market value of each of the Trust's shares has since declined drastically, and they are presently trading at approximately \$5.63 per share. The warrants are generally regarded as being worthless at this time.

On February 25, 1975, petitioner Mason filed a six count derivative and class action complaint in the United States District Court for the Eastern District of Pennsylvania alleging violations of various provisions of the federal

securities laws, as well as pendent state law claims. On March 20, 1975, the action was transferred by consent to the Southern District of New York pursuant to 28 U.S.C. Section 1404(a).

Respondent C.I. Realty Investors is a Real Estate Investment Trust organized pursuant to Massachusetts law under a declaration of trust dated November 10, 1971, as amended on April 3, 1972. The shares of the Trust are registered with the Securities and Exchange Commission pursuant to Section 12 of the Exchange Act. The Trust's shares have been traded on the over-the-counter market and, since December 12, 1973, on the New York Stock Exchange.

#### The Amendment Complaint

Petitioner filed an amended complaint on November 19, 1975. The defendants named in the amended complaint, in addition to the Trust, are: City Investing Company, a corporation that controls the Trust and the Trust's advisor; C.I. Planning Corporation, an indirectly wholly owned subsidiary of City Investing Company which served as advisor to the Trust; eight individual trustees of the Trust; and Reynolds Securities, Inc., one of the two managing underwriters of the Trust's public offering of April 13, 1972.

Counts I, II and III of the amended complaint allege class action claims for violations by the defendants of Sections 10(b) and 13(a) of the Exchange Act and Rules 10b-5, 13a-1, 13a-11, and 13a-13 promulgated thereunder, as well as Sections 12(2) and 17(a) of the Securities Act of 1933 ("Securities Act") in connection with the preparation of the registration statement and issuance of the prospectus for the public offering of the Trust's shares commencing April 13, 1972. Count VI alleges class action claims for

violations of state law against all defendants except the Trust and Reynolds Securities, Inc. Counts I, II, III and VI are collectively referred to as the class action counts.

Count IV alleges violations of Sections 10(b) and 14(a) of the Exchange Act and Rules 10b-5 and 14a-9 promulgated thereunder, derivatively on behalf of the Trust against all of the defendants except Reynolds Securities, Inc. Count V alleged violations of the state fraud, self-dealing, conflict of interest and breach of fiduciary duty laws derivatively on behalf of the Trust against all of the defendants except Reynolds Securities, Inc.

#### The Motions Below

On December 12, 1975, defendants moved to stay the class action counts on the ground that they were duplicative of those in *David Steinberg, et al. v. William Polk Carey, et al.*, 75 Civ. 1695 (IBW), a related action which was also being actively litigated. Defendants also moved to dismiss the derivative counts on the grounds that plaintiff had failed to make demand upon the Trust's shareholders as required by Massachusetts law and that plaintiff could not properly maintain a derivative suit on behalf of the Trust at the same time he was prosecuting a class action against the Trust.

#### The District Court's Order

On May 3, 1976, the District Court issued an order staying the class action counts pending a final determination of the *Steinberg* action, and dismissing the derivative causes of action on the ground that petitioner had failed to make a demand on the shareholders of the Trust as required by applicable Massachusetts law. The District Court declined to hold that it was obligated to apply the law of the Eastern District of Pennsylvania, the transferor court,



on this issue. The District Court also made an express determination that there was no just reason for delay and pursuant to Fed. R. Civ. P. Rule 54(b) entered final judgment in favor of the defendants (Appendix B).

On May 27, 1976, petitioner filed a timely notice of appeal to the Second Circuit from the District Court's judgment.

## REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the decision of this Court in *J.I. Case v. Borak*, 377 U.S. 426 (1964).

The rulings below require the petitioner to make demand upon the shareholders prior to instituting suit in federal court to redress violations of federal securities laws. By imposing a burdensome and futile state procedural requirement as a prerequisite to this suit, the decision conflicts with *J.I. Case v. Borak*, 377 U.S. 426, 434-35 (1964). This Court there discussed the relationship of state corporation law vis-a-vis federally protected rights:

[W]e believe that the overriding federal law applicable here would, where the facts required, control the appropriateness of the redress *despite the provisions of state corporation law*, for it "is not uncommon for federal courts to fashion federal law where federal rights are concerned."

• • • • •

And if the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of the section might be frustrated. Furthermore, the hurdles that the victim might face (such as separate suits, as contemplated by *Dann v. Studebaker-Packard Corp.*, *supra*, security for expenses statutes, bringing in all parties necessary for complete relief, etc.) might well prove insuperable to effective relief. (emphasis added)

Here there can be no doubt that the shareholder demand requirement will "prove insuperable" to a derivative suit to redress violations of federal securities laws. Federal law, not state law, must govern the enforcement of federal rights. See *Tcherepnin v. Knight*, 389 U.S. 332, 337-38 (1967); *In re Pittsburgh & Lake Erie R.R. Co. Sec.*



& *Antitr. Lit.*, 543 F.2d 1058, 1064-67 (3rd Cir. 1976); *Drachman v. Harvey*, 453 F.2d 722, 727-30 (2d Cir. 1971) *aff'd in part, rev'd in part on other grounds*, 453 F.2d 736 (1972) (en banc); *Levitt v. Johnson*, 334 F.2d 815 (1st Cir. 1964), *cert. denied* 379 U.S. 961 (1965); *Jannes v. Microwave Communications*, 57 F.R.D. 18 (N.D. Ill. 1972); *Dopp v. American Electronics*, 55 F.R.D. 151, 155 (S.D.N.Y. 1972).

## 2. There exists a conflict in the Law of the Circuits regarding the important issue raised herein.

This petition raises the sensitive issue of the proper role of state corporation regulations in the remedial scheme of the federal securities laws. In the instant case, the decision below requires a plaintiff, prior to filing suit in federal court to enforce a right conferred upon him solely by the federal securities laws and exclusively lodged in the federal courts, to abide by a state law requiring a demand upon shareholders. This, no matter how burdensome or futile the procedure may be.

In dismissing the derivative counts of petitioner's complaint, the courts below relied on *Brody v. Chemical Bank*, 482 F.2d 1111 (2d Cir.), *cert. den.* 414 U.S. 1104 (1973) and *Jones v. The Equitable Life Assurance Society*, 409 F. Supp. 370 (S.D.N.Y. 1975). These cases hold that where, as here, a derivative action is instituted pursuant to Federal Rule of Civil Procedure 23.1, the federal courts will look to state law to determine whether a demand on stockholders is necessary. *Brody, supra*, at 1114; *Jones, supra* at 374.

A decision directly in conflict with these decisions was rendered by the First Circuit Court of Appeals. There the court which encompasses the Commonwealth of Massachusetts was presented with the identical issue of whether

plaintiffs in a derivative lawsuit were required, under Rule 23.1 of the Federal Rules of Civil Procedure, to make a demand on the shareholders of a Massachusetts corporation before bringing suit under the federal securities laws. The court held that such demand was not required despite the provisions of Massachusetts law. *Levitt v. Johnson*, 334 F.2d 815 (1st Cir. 1964), *cert. denied* 379 U.S. 961 (1965).

The Court in *Levitt* distinguishes its earlier decision of *Halprin v. Babbitt*, 303 F.2d 138 (1st Cir. 1962) (holding that the minority must demand upon the majority), as follows: "In *Halprin* . . . 92% of the company's stock was held by one stockholder. We were not, in other words, speaking in the context of 48,000 stockholders, or as to when such a circumstance might constitute an excuse." 334 F.2d at 817. Most importantly, the court further stated that: "Nor does *Halprin*, which was a diversity case, answer the question of what law presently governs." 334 F.2d at 817.

The court specifically disapproved of the lower court's holding that state law applies "even if the claim which the corporation has against the alleged wrongdoers is based on a federal statute." Indeed, the First Circuit in *Levitt* specifically held that Massachusetts state law was irrelevant:

"We need not pursue the inquiry of whether the Massachusetts law is otherwise, because if it is, it should not, in our opinion, be applied." 384 F.2d at 819.

Recognizing the important congressional policy underlying the securities laws, the *Levitt* court held that it could "not see how it can be gainsaid that any substantial stiffening of the conditions precedent to the bringing of stockholders' suits above normal requirements would conflict with this broad declaration (of national policy)." 334 F.2d at 819. As the court continued:

"The district court's reasoning that since the stockholder's right is a derivative one, his right to bring suit must be controlled by the local law of the state of incorporation in the absence of an explicit congressional direction to the contrary negates the intentment of the act and underestimates the role to be played by the federal courts in the implementation of national regulatory legislation. See Note, 50 Va. L. Rev. 365 (1964)." 334 F.2d at 819.

In so holding, the *Levitt* court relied on this Court's decision in *J.I. Case Co. v. Borak*, *supra*.

The law of the First Circuit then, is that a state law requiring a shareholder demand does not control in derivative suits grounded on the federal securities laws. The *Levitt* decision has received widespread acceptance by the commentators.<sup>1</sup>

The Third Circuit, too, has taken a position in conflict with the Courts below. In discussing the standing of a trustee of bondholders to object to a settlement of a class and derivative settlement, the Circuit stated:

We conclude that standing in a Rule 23.1 case to assert a derivative claim based on federal law is a federal law question, and that for the same reasons standing to object to the settlement of such a claim is a federal law question.

*In re Pittsburgh & Lake Erie R.R. Co. Sec. & Antitr. Lit.*, *supra*, at 1067 (emphasis added).

1. E.g., Note, 78 Harv. L. Rev. 1476 (1965); Note, 50 Va. L. Rev. 365 (1964) (criticizing the lower court decision in *Levitt* since overturned by the First Circuit). See also, *Bromberg*, Fraud-SEC Rule 10b-5 Section 11.7 (1975); Bloomenthal, Securities and Federal Corporate Law, Section 11.20(2) (1974); 7A Wright & Miller, Federal Practice and Procedure: Civil Section 1832 (1972); 13 Fletcher Cye. Corp. Section 5970 at 385 (1970 Revised Ed.); Loss, Securities Regulation, Vol. II at 951 (1961), as supplemented, Vol. V at 2920 (1969); Carey, Cases on Corporations, 4th Ed. at 341 (1969).

Such a position is in complete accord with that asserted by petitioner. In a derivative suit asserting violations of the federal securities laws, the Court should look to federal law in determining the necessity for a demand on stockholders.

In a closely analogous situation, the Third Circuit has held that a plaintiff in a derivative suit alleging violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j(b) did not have to comply with state security for costs statutes. *McClure v. Borne Chemical*, 292 F.2d 824 (3d Cir.), *cert. denied* 368 U.S. 939 (1961). Indeed, the Third Circuit in *Rodgers v. American Can Co.*, 305 F.2d 297 (3d Cir. 1962) in perhaps the most exhaustive analysis of the issue presented in this petition, held that even though the shareholders of a corporation had refused to authorize a lawsuit after demand upon them, such refusal could not stop a derivative plaintiff in his attempt to correct violations of federal law. Clearly the Third Circuit would not require a party to pursue a meaningless formality prior to suit. See *Weiss v. Sunasco, Inc.*, 316 F. Supp. 1197 (E.D. Pa. 1970).

The prevailing view from a District Court in the Seventh Circuit too, is in conflict with the rulings below. Senior Judge Robson (then Chief Judge), was presented with the same issue in *Jannes v. Microwave Communications, Inc.*, 57 F.R.D. 18 (N.D. Ill. 1972). In *Jannes* the parties disagreed as to whether Illinois law required a demand on shareholders. The court refused to even consider Illinois law, holding:

"The parties discuss at some length whether Illinois law would require a demand on the shareholders under the circumstances of this suit, but this court is of the opinion that federal common law controls. Although speaking of whether a federal cause of action was created by violation of Section 14(a) of



the Securities Exchange Act, the comment of the Supreme Court is that "... the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law, for it "is not uncommon for federal courts to fashion federal law where federal rights are concerned." *J.I. Case Co. v. Borak*, 377 U.S. 426, 434, 84 S. Ct. 1555, 1561, 12 L. Ed. 2d 423 (1964). Furthermore, one reason that federal jurisdiction is necessary in order to effectuate the Securities Exchange Act is to avoid state law hurdles which 'might well prove insuperable to effective relief.' *Id.* at 435, 84 S. Ct. at 1561. In connection with Sec. 14(a) there is authority that whether a shareholder demand is necessary is 'clearly' a matter of federal law. 2 Loss, Securities Regulation 951 (1961). This court can discern no reason why Section 10(b) should be interpreted differently from Section 14(a) of the same act." 57 F.R.D. at 22 (emphasis added).

In addition to state shareholder demand requirements and security for expenses laws, the federal courts have held other provisions of state law to be inapplicable or irrelevant to actions grounded on the federal securities statutes. *Wolf v. Frank*, 477 F.2d 467 (5th Cir. 1973), *cert. denied* 414 U.S. 975 (1973) (allowance of prejudgment interest with 10b-5 damage award); *Fields v. Fidelity Gen. Ins. Co.*, 454 F.2d 682 (7th Cir. 1971) (dictum that a derivative 10b-5 action may be maintained despite the lack of authority to sue from state court supervising corporate liquidation); *Drachman v. Harvey*, 453 F.2d 722 (2d Cir. 1971), *aff'd in part and rev'd in part on other grounds*, 453 F.2d 736 (1972) (*en banc*) (standing of an equitable stockholder to bring a derivative 10b-5 action); *Clement A. Evans & Co. v. McAlpine*, 434 F.2d 100 (5th Cir. 1970), *cert. denied* 402 U.S. 988 (1971) (10-b civil action does not require the application of state substantive law of fraud); *Myzel v.*

*Fields*, 386 F.2d 718 (8th Cir. 1967), *cert. denied* 390 U.S. 951 (1968) (election of remedies doctrine); *Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964) (*en banc*) (award of attorney fees for merely prompting corporation to bring an action under Section 16(b) of the Exchange Act); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 958 n.2 (S.D.N.Y. 1970) (contribution and indemnification for violations of federal securities laws), *aff'd* 442 F.2d 1346 (2d Cir.), *cert. denied* 404 U.S. 941 (1971); *Hall v. American Cone & Pretzel Co.*, 71 F. Supp. 266 (E.D. Pa. 1947) (non-interference with foreign corporation doctrine). Similarly, the courts have also held that the definition of the various terms used in the federal securities statutes are dependent on federal law and the policy underlying these statutes and not on the contrary provisions of state law. *E.g.*, *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *Champion Home Builders Co. v. Jeffress*, 490 F.2d 611 (6th Cir. 1974), *cert. denied* 416 U.S. 986 (1974); *S.E.C. v. Sterling Precision Corp.*, 393 F.2d 214 (2d Cir. 1968).

Not only is the decision below in direct conflict with the law of the First and Third Circuits, but it also ignores the prevailing precedent regarding the history and purpose of the federal securities laws.

3. State corporate law which conflicts with the overriding federal interest in the protection of the investing public cannot control litigation under the Exchange Act.

In discussing the intent of Congress in passing the various federal securities laws including the Exchange Act,<sup>2</sup> upon which Count IV of appellant's Complaint is grounded, this Court noted:

2. 48 Stat. 881, as amended, 15 U.S.C. Section 78a *et seq.*



["All of these statutes were] designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's. . . . A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry. As we recently said in a related context, 'it requires but little appreciation\*\*\* of what happened in this country during the 1920's 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry.'"

*S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180, 186-7 (1963) (citations omitted). Accord, *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). It is thus well settled that, as with all remedial legislation, the Exchange Act is to be construed to effectuate its purposes, central of which is the protection of the investing public through disclosure, as well as strong civil and criminal penalties to prevent and punish fraud. *E.g.*, *Affiliated Ute*, *supra*; *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *Crane v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied* 400 U.S. 822 (1970); *Columbia General Investing Corp. v. S.E.C.*, 265 F.2d 559 (5th Cir. 1959).

In light of this overriding Congressional concern with the protection of the investing public, the federal courts are to fashion appropriate remedies to effectuate this Congressional purpose despite the contrary provisions of state corporate law which may limit the nature of available remedies. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). In holding that the Exchange Act authorizes a federal cause of action for rescission or damages, the Court in *J.I. Case*

*Co.* expressly stated that if victims of deceptive proxy statements were obliged to seek relief in the state courts, the purpose of Section 14 of the Exchange Act would be frustrated if the state either attached no responsibility to the use of misleading proxy statements or placed various procedural hurdles which could "well prove insuperable to effective relief." *Id.* at 434-5

These reservations would apply with even more force if these state procedural or substantive hurdles (such as mandatory demand on the stockholders in all cases) were held to apply under Rule 23.1 to derivative suits in federal court under the federal securities laws. Indeed, the special Congressional protection would be of no avail to derivative plaintiffs, as the District Court's order would suggest, any one state or group of states could frustrate the purpose of these statutes by enacting burdensome conditions precedent to the maintenance of derivative suits.

Furthermore, it is unrealistic to claim that since a stockholder's right to sue derivatively on behalf of his corporation arises from state law, that the "necessity" under Rule 23.1<sup>3</sup> of a demand on the body of stockholders would also depend on state law. Rather, it is just the opposite. The stockholder's derivative suit and the limitations upon its use were initially developed by the federal courts as part of their powers as courts of equity. *Fielding v. Allen*, 181 F.2d 163, 167-8 (2d Cir.), *cert. denied sub nom Ogden Corp. v. Fielding*, 340 U.S. 817 (1950). Accord, *McClure v. Borne Chemical Co.*, 292 F.2d 824, 832-34 (3d Cir.), *cert. denied* 368 U.S. 939 (1961); see *Hawes v. City of Oakland*, 104 U.S. 450 (1882). Indeed, a shareholder's

3. Rule 23.1 only requires a demand on the shareholders "if necessary." This "if necessary" qualification has been interpreted as referring the federal court to the substantive law upon which the suit is grounded—that is federal law in the instant case. *Janney v. Microwave Communications, Inc.*, 57 F.R.D. 18 (N.D. Ill. 1972); 7A Wright & Miller, *Federal Practice and Procedure: Civil Section* 1832 at 385 (1972).

right to "maintain a derivative action on a corporate right federal in nature is federally conferred." *Fielding, supra*; *McClure, supra*. Mindful of the overriding federal interest in obtaining a high standard of business ethics in the securities industry as well as the equitable origin of the derivative suit in federal court, the overwhelming number of courts which have decided this issue have held that the demand on the stockholders requirement embodied in state law will not control where that law would harm the federal interests receiving expression in the derivative right sought to be enforced. *Levitt v. Johnson*, 334 F.2d 815 (1st Cir. 1964), cert. denied 379 U.S. 961 (1965); *Phillips v. Bradford*, 62 F.R.D. 681 (S.D.N.Y. 1974); *Jannes v. Microwave Communications, Inc.*, 57 F.R.D. 18 (N.D. Ill. 1972); *Dopp v. American Electronic Lab's, Inc.*, 55 F.R.D. 151, 155 and n.10 (S.D.N.Y. 1972); see *In re Pittsburgh & Lake Erie R.R. Co. Sec. & Antitr. Lit.*, *supra*; *Drachman v. Harvey, supra*; *McClure v. Borne Chemical Co.*, 292 F.2d 824 (3rd Cir. 1961).

In the instant situation, federal law should determine the necessity for shareholder demand.

4. This court should decide the question of whether the rationale underlying *Van Dusen v. Barrack*, 376 U.S. 612 (1964) determines the interpretation of *federal* law which the transferor district would apply.

It is well settled that if a case is transferred pursuant to 28 U.S.C. Section 1404(a), the state law of the transferor forum, not the transferee forum, must apply. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964):

"We conclude. . . that in cases such as the present where the defendants seek transfer, the transferee district court must be obligated to apply the state

law that would have been applied if there had been no change of venue. A change of venue under Section 1404(a) generally should be, with respect to state law, but a change of courtrooms."

The question raised by this petition, however, is whether this same rationale should apply to mandate that the interpretation of *federal* law which exists in the transferor forum, should be binding on the transferee court. Compare, *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 408 and n.7 (2d Cir. 1975); *In re Air Crash Disaster at Boston, Mass.*, 399 F. Supp. 1106, 1108 (D. Mass. 1975); *In re Four Seasons Sec. Lit.*, 370 F. Supp. 219 (W.D. Oke. 1974); *In re Plumbing Fixtures Lit.*, 342 F. Supp. 756 (JPML 1972); *Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1053 (E.D. Pa. 1969) with *Scheinbart v. Certain-Teed Products Corp.*, 367 F. Supp. 707, 711 (S.D.N.Y. 1973); *H.L. Green Co. v. MacMahon*, 312 F.2d 650 (2d Cir. 1962), cert. denied 372 U.S. 928 (1963).

With the widespread practice of transfers under Sections 1404 and 1407 and the increased frequency of involuntary consolidations and transfers by the Judicial Panel on Multidistrict Litigation, this Court should decide this issue. See *In re Pittsburgh & Lake Erie R.R. Co. Sec. & Antitr. Lit.*, 543 F.2d 1058, 1065, n.19 (3rd Cir. 1976).

## CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that this Court issue its Writ of Certiorari so as to bring before it for briefing and argument the questions of federal law presented.

Respectfully submitted,

/s/ Richard D. Greenfield  
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 PHILIP STEPHEN FUOCO  
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## APPENDIX A

## UNITED STATES COURT OF APPEALS

for the

Second Circuit

76-7258

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IRVING MASON, on behalf of himself and all others  
 similarly situated, and derivatively on behalf of  
 C. I. Realty Investors,  
*Plaintiffs-Appellants,*

vs.

CITY INVESTING COMPANY, et al.,  
*Defendants-Appellees.*

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APPEAL FROM THE UNITED STATES  
 DISTRICT COURT OF THE  
 SOUTHERN DISTRICT OF NEW YORK  
 (Filed November 9, 1976)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is *affirmed* on the ground that plaintiff has failed to make a demand pursuant to Fed. R. Civ. P. 23.1 upon the shareholders of defendant C.I. Realty Investors as required by Massachusetts law. See *Brody v.*



*Chemical Bank*, 482 F.2d 1111 (2d Cir. 1973); *Jones v. Equitable Life Assurance Society*, 409 F. Supp. 370 (S.D. N.Y. 1975).

/s/ Paul R. Hays  
PAUL R. HAYS

/s/ Robert P. Anderson  
ROBERT P. ANDERSON

/s/ William H. Timbers  
WILLIAM H. TIMBERS  
Circuit Judges

## APPENDIX B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
75 Civ 1811 (IBW)

IRVING MASON, on behalf of himself and all others  
similarly situated, and derivatively on behalf of  
C.I. REALTY INVESTORS,  
Plaintiff,

vs.

CITY INVESTING COMPANY, *et al.*,  
Defendants.

## ORDER AND FINAL JUDGMENT (Filed May 3, 1976)

Defendants City Investing Company, C.I. Realty Investors, C.I. Planning Corporation, John L. Gibbons, Peter C. R. Huang, James V. Tomai, Jr., William S. Renchard, Fred R. Sullivan and Reynolds Securities Inc. having moved this court for an order staying Counts I, II, III and VI of the Amended Complaint on the grounds that the prosecution of the instant case concurrently with that of *Steinberg v. Carey* 75 Civ 1695 (IBW) results in needless expenditure of the resources and time of defendants and the Court since both actions are virtually identical and dismissing Counts IV and V of the Amended Complaint on the grounds that Plaintiff has failed to make upon the security holders of defendant C.I. Realty Investors as required by Massachusetts law and on the grounds that Plaintiff cannot prop-

erly maintain a suit derivatively on behalf of defendant C.I. Realty Investors at the same time he is prosecuting direct claims against such defendant, and oral argument on these motions having been heard, IT IS HEREBY ORDERED, Adjudged and Decreed:

A. That all proceedings and discovery in connection with Counts I, II, III and VI of the Amended Complaint herein (the direct claims) are stayed until final determination of the related case of *Steinberg v. Carey*, 75 Civ 1695 (IBW) and

B. That Counts IV and V of the amended complaint herein (the derivative claims) are dismissed on the grounds that Plaintiff has failed to make demand upon the shareholders of defendant C.I. Realty Investors as required by Massachusetts law.

The Court having made an express determination that there is no just reason for delay, IT IS FURTHER ORDERED that pursuant to Rule 54(b) of the Federal Rules of Civil Procedure entry of a final judgment in favor of defendants is hereby expressly directed as to Counts IV and V (the derivative claims).

/s/ Inzer B. Wyatt  
INZER B. WYATT, U.S.D.J.

DATED: New York, N.Y.  
May, 3, 1976

## APPENDIX C STATUTES AND RULES INVOLVED

### FEDERAL RULES OF CIVIL PROCEDURE

#### Rule 23.1

#### DERIVATIVE ACTIONS BY SHAREHOLDERS

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

SECURITIES EXCHANGE ACT OF 1934  
15 USC Secs. 78a-78jj as amended

REGULATION OF THE USE OF MANIPULATIVE  
AND DECEPTIVE DEVICES

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 USC Sec. 78j.

PROXIES

Sec. 14. (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

15 USC Sec. 78n.

SECURITIES AND EXCHANGE COMMISSION  
Rules under the Securities Exchange Act of 1934

Rule 10b-5

Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 CFR §240.10b-5

Rule 14a-9

False or Misleading Statements

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 CFR §240.14a-9



**APPENDIX D**

**UNITED STATES COURT OF APPEALS**

**for the**

**Second Circuit**

**77-7258**

---

**IRVING MASON, on behalf of himself and all others  
similarly situated, and derivatively on behalf of**

**C. I. Realty Investors,**

***Plaintiff-Appellants,***

**vs.**

**CITY INVESTING COMPANY, et al.,**

***Defendants-Appellees.***

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A petition for a rehearing having been filed herein by  
counsel for the PLAINTIFF-APPELLANT,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro  
Clerk

(Filed February 18, 1977)